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No. 84-380

In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES DAVID OSTICCO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial court erred in admitting into evidence taped conversations of a co-conspirator without requiring a grant of testimonial immunity after the co-conspirator had invoked the privilege against self-incrimination.

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 13a-14a) is reported at 738 F.2d 424 (Table). The memorandum opinion of the district court (Pet. App. 1a-12a) is reported at 580 F. Supp. 484.

JURISDICTION

The judgment of the court of appeals was entered on June 12, 1984. A petition for rehearing was denied on July 9, 1984 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on September 7, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of conspiracy to obstruct justice, in violation of 18 U.S.C. 371, and obstruction of justice, in violation of 18 U.S.C. 1503. Petitioner was sentenced to five years' imprisonment on the conspiracy count and three years' imprisonment on the substantive counts, the sentences to be served consecutively. He was also fined a total of $13,000.

1. Petitioner's conviction resulted from his attempts to cover up activities relating to the so-called "flood fraud" trial, held in Scranton, Pennsylvania in late 1977. Four men had been indicted on fraud charges in connection with the federally funded cleanup effort in the Scranton/Wilkes-Barre region following the 1972 flood caused by hurricane Agnes. The indictment charged the men with receiving $500,000 for relief work not actually done and for equipment not actually supplied to local governments involved in the cleanup effort (Tr. 587). The trial lasted approximately seven weeks. After three days of deliberation the jury reported that it was unable to reach a verdict, and a mistrial was ultimately declared. The only juror to vote against conviction was Roseanne Donahue, who was then married to Charles Cortese (Tr. 598).

The evidence at trial (see Pet. App. 2a-4a) showed that in 1979 Cortese told Frank Parlopiano that he was the former husband of the holdout juror in the "flood fraud" trial and that Parlopiano should ask petitioner about Cortese. Cortese stated that at some point during the flood fraud trial petitioner had contacted him. Petitioner had told Cortese that some friends of his were involved in the trial and that he

wanted Cortese to get his wife (Donahue) to vote against conviction. Cortese agreed, and, after some initial hesitation, Donahue agreed to do as petitioner and her husband asked. As part of their agreement, petitioner gave Cortese $1,000, a set of automobile tires, and a pocket watch (Tr. 600-601).

In late December 1979, Cortese told Parlopiano that he had been served with a subpoena to appear before a grand jury that was investigating alleged jury tampering in the flood fraud trial (Tr. 781). In the second of two meetings between Parlopiano and petitioner to discuss Cortese's subpoena, petitioner instructed Parlopiano to tell Cortese to "keep his mouth shut," to "take the Fifth if he had to," and that petitioner would "take care" of Cortese's legal fees (Tr. 784). Parlopiano, pursuant to petitioner's directive, passed these instructions on to Cortese. Cortese appeared before the grand jury on January 3, 1980; as petitioner had directed, Cortese invoked his Fifth Amendment privilege (Tr. 785).

In February 1980, Cortese received a second subpoena to testify before the grand jury; in addition, he was granted immunity. Cortese reported this to Parlopiano who, in turn, told petitioner. Petitioner instructed Parlopiano to tell Cortese that "he has to lie now" (Tr. 802). Petitioner asked Parlopiano to attempt to find out what questions were asked of Cortese before the grand jury. Parlopiano then met with Cortese and told him, "these are the instructions that [petitioner] gave me to pass on to you" (Tr. 803). Parlopiano told Cortese "to lie if he had to," that "his attorney's fees would be taken care of," and that as soon as he had finished testifying to write down as many of the grand jury questions as he could remember (Tr. 803). Cortese testified on March 7,

1980, and subsequently met with Parlopiano. Cortese told Parlopiano that he had lied to the grand jury; he gave Parlopiano two or three sheets of paper on which Cortese had written some of the questions he was asked. Parlopiano eventually gave these sheets to petitioner, who kept them (Tr. 804). Cortese also told Roseanne Donahue, his former wife, that he had lied to the grand jury (Tr. 603).

In July 1981, petitioner instructed Parlopiano to tell Cortese that if he "stuck to his guns" there would be "a buck" in it for Cortese when the statute of limitations expired on the jury tampering investigation (Tr. 820). Petitioner also told Parlopiano that when it's all over "I'm gonna take care of" Cortese with "two shots in the head." Later in the same conversation, petitioner told Parlopiano, "there's nothing you have to tell [Cortese]. The only thing you got to tell him is keep his mouth shut. Right now." GXs 18, 20A.

Around this time Cortese told Parlopiano that he was having difficulties paying bills he had incurred. Parlopiano discussed the problem with petitioner, who agreed to give Cortese some money to cover the bills. Petitioner gave Cortese $400, through Parlopiano, in July 1981. Parlopiano advised Cortese that petitioner was the source of the funds. Pursuant to petitioner's instructions, Cortese executed a promissory note stating that the $400 was from Parlopiano and was to be repaid within one year (Tr. 843). Parlopiano showed the promissory note to petitioner on the following day. Petitioner instructed Parlopiano to retain the note "in case you need it one day" (Tr. 843).

During this period Parlopiano agreed to cooperate with an FBI investigation. From May 1980 until

September 1982 he taped numerous conversations he had with petitioner, Cortese, and others (Tr. 766).[1]

2. At petitioner's trial, the government called Cortese to testify. Cortese invoked his privilege against self-incrimination in response to questions by both government counsel and defense counsel. Petitioner then moved to require the government to immunize Cortese, but the trial court denied the motion. The government subsequently introduced taped conversations between Cortese and Parlopiano as statements against interest of an unavailable witness, pursuant to Fed. R. Evid. 804(b)(3), or, alternatively, as statements of a co-conspirator made during the course of and in furtherance of the conspiracy, pursuant to Fed. R. Evid. 801(d)(2)(E). The trial court admitted the taped conversations, and they were played for the jury.

In post-trial motions, petitioner renewed his contention that the government should have granted immunity to Cortese. The district court rejected that claim. It noted, inter alia, that "[n]o serious argument can be made that the government's decision not to seek immunity for Cortese resulted from a deliberate intention to frustrate the fact finding process or to prevent testimony that was essential to [petitioner's] defense" (Pet. App. 7a).

3. The court of appeals affirmed petitioner's convictions in a judgment order (Pet. App. 13a-14a). The court rejected petitioner's claims that the evidence was insufficient to support his convictions; that the jury instructions were erroneous; that conversa-

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[1] In July 1983, Cortese pleaded guilty to perjury before the grand jury. Donahue previously had pleaded guilty to a charge of obstruction of justice, based on her role in the flood fraud trial (Tr. 604).

tions between Parlopiano and Cortese should not have been admitted into evidence because the government had failed to confer immunity on Cortese; and that those conversations were not in furtherance of the conspiracy.

ARGUMENT

Petitioner contends (Pet. 6-13) that the trial court erred in admitting the conversations between Cortese and Parlopiano because Cortese's assertion of his privilege did not render him "unavailable" in the absence of a showing by the government that it had some significant interest in not granting him immunity. That contention lacks merit. The order of the court of appeals affirming the trial court's ruling does not warrant further review.

Petitioner does not suggest that the conversations were inadmissible under the Federal Rules of Evidence. The trial court admitted the conversations as co-conspirator statements under Fed. R. Evid. 801(d)(2)(E). See Pet. App. 7a. Under that rule, there is no requirement that the declarant be unavailable. The conversations also qualified as statements against interest of an unavailable witness, pursuant to Fed. R. Evid. 804(b)(3). Fed. R. Evid. 804(a)(1) expressly provides that a witness is unavailable if his testimony cannot be obtained because of a claim of privilege.[2] Before any of the tapes were played, Cortese was called to the witness stand and invoked his Fifth Amendment privilege in response to

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[2] The courts of appeals have agreed that a witness is unavailable if he refuses to testify on Fifth Amendment grounds. See, *e.g.*, *United States* v. *Rodriguez*, 706 F.2d 31, 40 (2d Cir. 1983); *United States* v. *MacCloskey*, 682 F.2d 468, 477 (4th Cir. 1982); *United States* v. *Toney*, 599 F.2d 787, 789-790 (6th Cir. 1979).

questions by both the prosecution and defense counsel. Thus, he was unavailable within the meaning of Rule 804(a)(1).

Petitioner concedes (Pet. 9) that the courts have rejected the contention that the government should be precluded from introducing hearsay declarations of a witness who asserts his Fifth Amendment privilege if it has failed to grant immunity to the witness. See, *e.g.*, *United States* v. *Wuagneux*, 683 F.2d 1343, 1358 n.11 (11th Cir. 1982), cert. denied, No. 82-1687 (Oct. 3, 1983); *United States* v. *Lang*, 589 F.2d 92, 95-97 (2d Cir. 1978); 4 D. Louisell & C. Mueller, *Federal Evidence* § 486, at 1030, 1070-1072 (1980). That view is consistent with the general principle that the decision whether to grant immunity is a prerogative solely of the prosecutor. See *United States* v. *Doe*, No. 82-786 (Feb. 28, 1984), slip op. 11; *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 260-261 (1983); *United States* v. *Gottesman*, 724 F.2d 1517, 1524 & n.7 (11th Cir. 1984); *Snelling* v. *United States*, 719 F.2d 1067, 1068 n.3 (10th Cir. 1983); *United States* v. *Lenz*, 616 F.2d 960, 962-963 (6th Cir.), cert. denied, 447 U.S. 929 (1980).[3]

Petitioner nevertheless contends that *Ohio* v. *Roberts*, 448 U.S. 56 (1980), compels a different rule, since it suggests that the prosecution must make a

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[3] Indeed, the Third Circuit is the only court of appeals to have held that a court might ever have inherent authority to grant immunity, *Gov't of the Virgin Islands* v. *Smith*, 615 F.2d 964 (1980), but even that decision is limited to cases involving exceptional circumstances and has not, to the best of our knowledge, been applied to justify a grant of judicial immunity in any subsequent case. It is clear from the Third Circuit's disposition of the instant case that it found no exceptional circumstances here that could warrant such extraordinary action.

good faith effort to obtain a witness's presence at trial before the witness will be considered unavailable for purposes of the Sixth Amendment Confrontation Clause. But the Court was referring there to efforts to obtain the physical presence of a witness, not to a grant of immunity. See 448 U.S. at 74.[4] The Court in *Roberts* also held that hearsay evidence must be reliable in order to satisfy the Confrontation Clause. However, the Court went on to state that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception" (448 U.S. at 66). Petitioner does not deny that the conversations at issue here were within the hearsay exceptions of Rules 801(d)(2)(E) and 804(b)(3).[5]

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[4] The Third Circuit has recently held that the Confrontation Clause requires a showing of unavailability of the extra-judicial declarant as a prerequisite to admission of co-conspirator declarations under Rule 801(d)(2)(E). *United States* v. *Inadi*, No. 83-1882 (Nov. 13, 1984), slip op. 11-13. We do not agree with this holding and are currently considering whether to seek en banc or certiorari review in that case. It is, however, wholly immaterial here, since there is no suggestion that the procedures followed in this case are not entirely adequate to demonstrate unavailability.

[5] A number of courts of appeals have held that statements that fall within the co-conspirator exception to the hearsay rule automatically satisfy Confrontation Clause standards. See, *e.g.*, *United States* v. *Lurz*, 666 F.2d 69, 80-81 (4th Cir. 1981), cert. denied, 455 U.S. 1005 (1982) and 457 U.S. 1136 (1982); *United States* v. *Kendall*, 665 F.2d 126, 133 (7th Cir. 1981), cert. denied, 455 U.S. 1021 (1982); *United States* v. *Peacock*, 654 F.2d 339, 349 (5th Cir. 1981), cert. denied, No. 82-1069 (Nov. 7, 1983); *United States* v. *Burroughs*, 650 F.2d 595, 597 n.3 (5th Cir.), cert. denied, 454 U.S. 1037 (1981); *United States* v. *Papia*, 560 F.2d 827, 836 n.3 (7th Cir. 1977); *Ottomano* v. *United States*, 468 F.2d 269, 273 (1st Cir. 1972), cert. denied, 409 U.S. 1128 (1973). Other

Indeed, he does not challenge the reliability of the statements at all. Thus, nothing in *Roberts* requires a result different from that reached by the courts below.

Moreover, there is no merit to petitioner's claim that the government's failure to immunize Cortese impaired the fairness of his trial. Assuming arguendo that Cortese would have testified under a grant of immunity, petitioner makes no showing that such testimony would have influenced the outcome of the trial in any way. The credibility of any testimony by Cortese that might have been favorable to petitioner presumably would have been destroyed by cross-examination based on his earlier admission in the taped conversations and on his plea of guilty to charges of perjury involving his denials to the grand jury concerning his involvement with petitioner in the jury-tampering scheme and subsequent cover-up. Cortese's hypothetical testimony thus would have offered little support for petitioner's defense, and, indeed, might well have harmed it.[6]

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courts have concluded that an independent showing of reliability of co-conspirator statements is constitutionally required. See *United States* v. *Ordonez*, 737 F.2d 793, 802-804 (9th Cir. 1984); *United States* v. *Ammar*, 714 F.2d 238, 254-257 (3d Cir. 1983), cert. denied, No. 83-319 (Oct. 31, 1983); *United States* v. *Wright*, 588 F.2d 31, 37-38 (2d Cir. 1978), cert. denied, 440 U.S. 917 (1979); *United States* v. *Kelley*, 526 F.2d 615, 620-621 (8th Cir. 1975), cert. denied, 424 U.S. 971 (1976). However, there is no basis for arguing here that Cortese's statements would fail to satisfy any such requirement.

[6] Petitioner suggests (Pet. 9-10) that the government should have been required to grant immunity to Cortese in connection with petitioner's trial because it previously had granted him

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1984

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immunity in connection with testimony before the grand jury. Of course, it was entirely appropriate for the government to grant immunity to Cortese at the time it was attempting to determine the guilt of more culpable individuals, like petitioner, who had initiated the jury tampering scheme. By the time of petitioner's trial, there was no legitimate investigative purpose that would have been served by granting further immunity to Cortese.

Contrary to petitioner's suggestion (Pet. 10), the government did not gain any particular tactical advantage in not immunizing Cortese. As we have suggested in the text, any testimony Cortese would have given either would have been favorable to the government or would have been subject to effective cross-examination.

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